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ROMANIA'S TAKE ON CONSTITUTIONALISM. A COMPARATIVE APPROACH TOWARDS CONSTITUTIONAL COURTS

MATEI LADEA

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Abstract

"Who will guard the guardians?" is both an old and still pertinent question. This research in progress investigates the place of constitutional courts as guardians of fundamental laws and balance setters in political systems in the legal and political architecture of Romania and Germany. Using this rather unusual comparison, the text discusses the "political question doctrine" and the political involvement of these authorities.

Keywords: constitutional courts, German Constitution, German Constitutional Court, Romanian constitutionalism, Romanian Constitutional Court.

*Sed quis custodiet ipsos custodes?*¹

Some think that democracy is the most fit government system of all those history has presented us with. Thomas Jefferson once said: "I have no fear that the result of our experiment will be that men may be trusted to govern themselves without a master." Societies may find themselves under the spell of democracy and sometimes act in the name of equality and equity. Still, we need to acknowledge that there are problems within democratic systems, at least regarding the overrated abstract idea that people are all equal, fact that helps the more powerful to hide their capacity and sometimes to secretly grow it. The best example consists in the newly born post-communist democratic regimes, which under the given impression of acting in the name of the people, legitimized by the popular vote, abuse in an unscrupulous and unlimited manner of their governmental power.²

¹ Juvenal, *Liber secundus, Satira VI*, lines 347-348, in *D. Junii Juvenalis Saturarum Libri V*, Erster Band, Leipzig, Verlag von S. Hirzel, 1895, p. 325, *apud* Leonid Hurwicz, "But Who Will Guard the Guardians?", in *American Economic Review*, 98, 3, 2008, pp. 577-585.

² Roger D. Congleton and Birgitta Swedenborg, *Democratic Constitutional Design and Public Policy*, The MIT Press, Cambridge, 2006, pp. 180-189.

When discussing democracy in an academic framework it is impossible not to also debate constitutions, the very core of democracy, the guardian and ensurer of rights and liberties. But, if democracy ensures and guards the observance of rights and liberties of the citizens and the constitution is the safe-guarder of democracy, than “who will guard the guardians”?³ Plato brought this up in his work *The Republic* and then some hundred years later Juvenal wondered again.

Passing the theoretical framework, this paper seeks to discuss the placement of constitutionalism and of its *corpus*, Constitutional Courts, in a democratic state, with regard to fundamental principles of democracy and political action. A short clarification is needed; I do not think, nor intend to suggest a pure theoretical, *sui generis* approach towards fundamental laws, do not believe in their purity and do not hope for perfection in constitutional action. This is why this paper does not separate politics in practice with those in theory and does not try to pull a veil of ignorance over determinant features of the process. Regarding the approach, a comparative one is sought, in order to see how different states, with distinct political educations but rather similar historical backgrounds (if not identical in form, quite akin in substance), place themselves in relation to constitutionalism and where these place constitutionalism (and its entire family – Constitutional Courts, fundamental principles, key rights etc.).

Keeping in mind that this article is not meant to be of the season, we cannot help but notice that the issues raised and debated are of utmost presence, many of them being of novelty, at least for democracy-reachers (post-communist regimes), while the democracy-graspers (democracy-traditionalists) still are on a touch-and-go development pattern, learning and excogitating. This and the social and political struggle of Romania’s last 23 years, push us to analitically scope among the structural problems, here bringing in for examination the fundamentals of the legal system and its family.

“We find ourselves under the government of a system of political institutions, conducting more essentially to the ends of civil and religious liberty, than any of which the history of former times tells us.

*We, when mounting the stage of existence, found ourselves the legal inheritors of these fundamental blessings.”*⁴

“Constitutions are giant restraining orders motivated by a passion for avoidance”⁵ and are designed to prevent or, if not possible, to somehow evade

³ Plato, *The Republic*, translated by Benjamin Jowett, E-Book produced by Sue Asscher and David Widger, 2008, available at <http://www.gutenberg.org/files/1497/1497-h/1497-h.htm>, accessed on 10 February 2010.

⁴ Abraham Lincoln, *Lyceum Address*, apud Bradley C.S. Watson (editor), *Ourselves and Our Posterity – Essays in Constitutional Originalism*, Lexington Books-Rowman and Littlefield Publishers, New York and Plymouth, 2009, p. VII.

some unwanted political aftermaths or judicial dangers. András Sajó states that constitutions are guardians against “tyranny, anarchy, paralysis, corruption and [...] stupidity of politicians”. Constitutionalism has made drastic changes not only in the way people’s rights are complied with but also in how states are organized, countries are led and development is pursued. The fact that Romania has a democratic constitution⁶ may be considered one of the obvious features of its breach from Communism. The post-communist Constitutions are documents that mark the birth of a nation in search of a new identity.⁷ Looking back upon a rather delicate time-frame, some would call the years when the democratic constitution was built, to be “the years of a failed constitutional moment”⁸. To be fair, the Romanian fundamental law has reached its purpose as a legal act, but it has not managed to fulfill the symbolic goal that stands at the origin of the civic attachment. The Euro-Atlantic integration managed to point out the imperfections of our constitutional system. The 2003 revision has not brought a too bright change, moreover, it was not marked by the most important feature in the amendment of a constitution, namely the conscious participation of the population in the process itself.⁹

According to Louis Henkin, the way we see constitutionalism today is the result of two centuries of modern standards government, that in fact was sourced out of the English, American and French revolutionary demands.¹⁰ Still, in its evolution, be it prolific for the Western developed States, constitutionalism has encountered many setbacks, especially in Eastern Europe where during the XXth century totalitarian regimes, constitutions were used to legitimize anti-democratic political systems. Authoritarian and totalitarian regimes used the symbolic power of the fundamental law, given to it by the former democratic regimes, under which constitutions were born. This is why constitutions under the Communist Party of Romania became tyrannic instruments¹¹ and also why

⁵ András Sajó, *Limiting Government: An introduction to Constitutionalism*, Central European University Press, Budapest, 1999, p. X.

⁶ I consider this avowal to need further explanation. Romania had its first official Fundamental Law in 1866, followed by the one of 1923, both of them constructed under democratic principles of the age, the one of 1923 granting particular observance to human rights observance and to the Separation of Powers. Between 1938 and 1991, Romania was under the rule of Constitutions but they were not at all democratic, in fact the ones in place from 1948 to 1989 were Communist Fundamental Laws which had no real respect for human rights and liberties or for the principles of democracy.

⁷ *Raportul Comisiei Prezidențiale de Analiză a Regimului Politic și Constituțional din România*, C.H. Beck, Bucharest, 2009.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ Louis Henkin, “A new birth of Constitutionalism: genetic influences and genetic defects”, in *Cardozo Law Review*, 14, 1993, pp.535-36, *apud* Radu Carp, Ioan Stanomir, *Limitele Constituției – Despre guvernare, politică și cetățenie în România*, C.H. Beck, Bucharest, 2008, p. 177.

¹¹ Radu Carp, Ioan Stanomir, *Op. cit.*, p. 175.

according to András Sajó, constitutional developments become completely relevant in 1989, with the fall of the communist regimes. He calls it a “moment of foundation that Constitutionalism becomes directly relevant”¹². In my opinion this is only partially relevant, because, as Cătălin Avramescu has underlined in one of his lectures at the Faculty of Political Science, University of Bucharest, European constitutionalism was not painted in democratic colours at its highest level, due to the influences of communist fundamental laws under the new, post-communist democratic governance.¹³

An analysis upon the Romanian political and constitutional regime, led by contemporary esteemed scholars, points out that we are in a desperate need of a new fundamental law, developed under the public scope and through a public debate (with the imperative participation of the whole nation) and not of another political maneuver. When talking about the 1991 Romanian Constitution we could say that because of the outcome of the first free elections after the communist demise, this document was tailored to fit the National Salvation Front and Ion Iliescu.

Events all over Europe, particularly in France and Finland, have shown that the new situations and tendencies lead towards modelling public life into the process of constitutional reanalysis and reconstruction. Looking at the Romanian one, one may notice its eclectic nature, similar to a mosaic where the elements put forward in 1991 contrast to the ones brought new in 2003. The 2004–2007 timeframe covers problems such as the poor quality of Romania’s democratic constitutionalism, the lack of referendum in solving constitutional conflicts, lack of legitimacy that constitutional authorities experience, and most tragically, the slightly criticizable decisions of the Constitutional Court.

The model picked for comparison is not one for equation, but rather for contrast, aiming to grasp and introduce the main differences that exist between the Romanian constitutional system and the one of a functioning, serving-as-a-model democracy. Analysis and characterization of a system can not be conducted without integrating it into a scaled supra-structure where it would be compared exogenously with other systems in order to outline differences and features.¹⁴ The democracy model used is the German constitutional one. This may seem a rather radical approach but it may be supported when taking into account the following features: while comparing, one not always needs to find resemblances, particularly if one seeks to discover the breaches in- or disfunctionalities of a system; Germany is a well performing political system

¹² András Sajó, *Op. cit.*, p. XIV.

¹³ Cătălin Avramescu grounded his statement by referring at the Hungarian case, where the 1949 communist Constitution is still in place, only being partially amended. Also, he presented the case of Poland, where the communist Constitution was replaced in 1997.

¹⁴ James Buchanan, “The Domain of Constitutional Economics”, in *Constitutional Political Economy*, I, 1, 1990, pp. 4-5.

with an acknowledged Constitution and an effective Constitutional Court; it is an EU leading, powerful, trend-setting state, particularly on issues of political, economic and "rule of law" concern; from a historical point of view, both countries suffered under totalitarian regimes, and both had to recover; although the process of recovery did not follow similar paths, currently both Romania and Germany may call themselves reasonable EU democracies, under the rule of law.

The nature of the destructive phenomenon that affected democratic and modern constitutional values of both states is rather different, on a *longue durée* perspective. While Germany suffered from a sequence of two world wars and an authoritarian regime in between, Romania experienced several years of mixed authoritarian regimes (starting 1938) and then another five decades of communism. While I will not argue for the harsher fate or the harder reconstruction, I will, however, point out that the first striking difference of the two processes lies in what and how they were enforced. While in the German case the need for re-democratization was both acute and cronic at the end of the Second World War and enforced militarily by an alliance of international forces, Romania's process was quite the opposite, coming from within, being generated and carried out mostly by Romanian people themselves. A first relevant observation is that while Romania was left to handle her re-democratisation and constitutional issues alone, Germany was kept under strategic observation, moreover it practically had a Constitution drafted by the Allies.¹⁵ Even if, while drafting a fundamental law in Germany "the existence of [...] true Government (could as well) be doubted"¹⁶, many contesting the actual continuous existence of a German state, the finality of the infernal *Trümmerzeit* (time of ruins) was a prolific one, concluded in political and democratic reconstruction, followed by economic development and social prosperity. Almost 70 years later, many in Europe and in the world look upon the German state with admiration, wondering how it did it. My hypothesis and one of the key ideas pushed forward during previous research, is that at the core of any *good* democracy, in the nucleus of a model state, we find a strong constitutional family and a constitutional *corpus*, with respect to all critical values. Therefore, in the context of the present comparison, I investigate what the German model has while the Romanian one does not. This article does not aim to provide reasons to import the German Fundamental Law, as such an idea would not be feasible for the Romanian state's structures and institutions. I rather aim to grasp the positive features of the German case and discuss to what extent Romania might learn from the German experience.

¹⁵ *Documents on the creation of the German Federal Constitution*, prepared by Civil Administration Division Office of Military Government for Germany (US), 1 September 1949, pp. 42-50.

¹⁶ Carl J. Friedrich, "Rebuilding the German Constitution, I", in *The American Political Science Review*, XLIII, 3, 1949, p. 461.

The *Verfassung* places the basic rights on a pedestal, offering them a central place, constructing on them and empowering the rights with kind of a *supreme authority* above all other state elements. Further on, the fundamental rights are protected through a non-revision clause,¹⁷ article 1 stipulating that “the following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law”. From a technical point of view, another important feature of this Fundamental Law is the detailed regulation it provides, granting a lot of attention to every stipulated element, not leaving anything equivocal or any place for ambiguity. A clear example of this supra-regulation is article 121 which defines what a majority is and how will the “majority of the Members” collocation be used.

When it comes to the substance of the German model, it creates a federal social state, under the rule-of-law and a parliamentary democracy, principles guaranteed by the constitutional order, which in its turn is theoretically and physically protected by art. 20, par. 4: “all Germans shall have the right to resist any person seeking to abolish this constitutional order”. Regarding the reference made earlier about democratic constitutions being the mark of a clear break from a totalitarian regime, the German one took this principle further, including a *lex lustratio* which provides for the continued applicability of the denazification provisions in article 139. Finally, one of the most important aspects of the German Fundamental Law is the amendment and construction process, which is quite rigid, meeting the needs of any state with lack of democratic experience and irresponsible politicians or decision-makers. Moreover, their procedures almost force the people to participate in the process, not making it possible for ignoring the popular desire.

One should still keep in mind that since 1949 onwards, the German Basic Law has been amended 52 times, a rather extraordinary number since by form and content it is a rigid Constitution. In the process, unlike the American proceedings, the Constitutional Court or other judiciaries play a small part, with the *Bundestag*¹⁸ Being at the forefront of revision processes. The German Constitutional Court considers changes in the Fundamental Law to be alterations of the constitutional reality, which in fact will lead to a modification of the government practice by remodeling the actors’ scene of action. Constitutional amendments are rarely sanctioned by the Court and this happens only when absolutely necessary, like updating law to modern realities. In most cases, this is blocked due to the belief that actions of amendment hurt the fundamental order.¹⁹

¹⁷ *Verfassung der Deutschen Demokratischen Republik*, art. 20, par. (1), par. (2), art. 79, par. (3).

¹⁸ Hans-Peter Schneider, “Herr oder Hueter des Grundgesetzes? Das Bundesverfassungsgericht als eigenstaendiger Akteur im Verfassungsleben”, in Andreas Fischer-Lescano, Hans-Peter Gasser, Thilo Marauhn, Natalino Ronzitt (eds.), *Frieden in Freiheit. Peace in liberty, Paix en liberté*, Nomos, Baden-Baden, 2008, p. 1019.

¹⁹ *Ibid.*, pp. 1024-1030.

In the absence of law, be it written or not, democracy cannot exist, or if it does, there is no guarantee in place. But what guards the law, particularly the fundamental one? It is constitutional courts. They are guardians of constitutionalism, protectors of fundamental laws and insurers of liberties, laws and political behavior. Contested or praised, they are also courts with a short tradition all around the world and even a shorter one in the former communist states.

Contemporary scholars argue that in Romania, after 1912 and with a clear and legal confirmation in the 1923 Constitution, “constitutional justice”²⁰ has become a reality, creating a Court that somehow resembled the “classic American model”²¹, characterized by “legal conservativeness” and different from European models like the German one.²²

Absent during communism, the principles of a Constitutional Court were reestablished in 1991, with the adoption of a new Constitution. At that time, the Constituent Assembly established a Court on the traditional (Austrian) model of Hans Kelsen, characterized by its capacity to arbitrate Romanian political life and to act as a “negative legislator”²³. According to Radu Carp and Ioan Stanomir, the new Constitutional Court was built on the historical background of the Interwar Court but has only partially risen to its original prestige. *Title V* of the 1991 Constitution regulated the organization, work, prerogatives, structure and development of the Romanian Constitutional Court (RCC). Still, this was only a hybrid form of what the Court used to be during the period between the two World Wars, moreover, only a prototype of what it was going to become after 1996²⁴ and after 2003²⁵. The nowadays Constitutional Court exists in accordance with the same *Title V* of the Romanian Constitution, being regulated by articles 142-147. As the Constitution stipulates in article 146 letter (I), the Court’s full description of work and organization is accounted in organic *Law no. 47/18 May 1992*, republished in 2010 under the *Law no. 177/3 December 2010* for the modification and supplementing of the *Law no. 47/18 May 1992*, regarding the organization and work of the Constitutional Court, and *Governmental Emergency Ordinance no. 38/2012*

²⁰ Paul Negulescu, George Alexianu, *Tratat de drept public*, Casa Școalelor Publishing House, Bucharest, 1943, pp. 120-30; *apud* Radu Carp, Ioan Stanomir, *op. cit.*, p. 223.

²¹ *Ibid.*

²² *Ibid.*

²³ Hans Kelsen, *General Theory of Law and State*, Oxford University Press, Harvard University Press, Cambridge, Massachusetts, 1949, p. 268.

²⁴ In 1996, a case was brought before the RCC, consisting in the petition to establish Mr. Ion Iliescu's legal incapacity to re-run for the Presidential elections. The Court analyzed the case by only contrasting the situation with the Constitutional text, reaching to the opinion that Mr. Iliescu's candidature was legitimate.

²⁵ The 2003 constitutional revision brought new powers to the RCC, and consolidated the old ones. Regarding the old powers, the RCC could now take definitive decisions which are no longer susceptible to debate in Parliament and are generally compulsory. In what concerns the new attributes, the Court was able from 2003, to legitimately debate on the controversies between political actors and institutions, through its capacity to solve legal disputes of constitutional nature.

for the modification and supplementing of the *Law no. 47/18 May 1992*, regarding the organization and work of the Constitutional Court.

The characteristics of the Court presented by the Constitution revolve around the principle that “the Constitutional Court shall be the guarantor for the supremacy of the Constitution”²⁶. The constitutional text also regulates the general structure of the RCC, namely that it is composed of nine judges of whom three are renewed every three years. The mandate of a judge lasts nine years and it is not renewable. The judges are appointed by the following authorities: three by the Romanian Presidency, three by the Romanian Senate and three by the Romanian Chamber of Deputies.²⁷ The prerogatives of this organism are first described in the Constitution, but are detailed in the organic law regulating its work and organization. The Constitution stipulates the general principle that the RCC decides upon the constitutionality of laws before they enter into force. This principle is described by Hans Kelsen on the matter of constitutional adjudication and debated by many constitutional law scholars. Furthermore, the Court may intervene for solving the legal disputes of constitutional nature which may emerge between public authorities. It also gives an advisory opinion on proposals for the state’s President suspension from office. According to the organic law regulating the work of the RCC, the Court has to confirm the results of the Presidential elections, as well as the results of a referendum. Also, it decides on objections upon the presumed unconstitutionality of laws and government ordinances already enforced. This last characteristic is different from the first one, concerning the review of old legislation and not of the new legislation elaborated by the Parliament. The practice resembles to the principle of constitutional review presented by Cass R. Sunstein in *Responding to Imperfection*.

Decisions, resolutions and advisory notices given by the RCC have some distinct characteristics, they “shall be generally binding and effective only for the future”²⁸. Another strange aspect for the Romanian legal system is invoking older jurisprudence of the Court as a system of recalling a “precedent”. This is in fact what the Romanian School of Law calls “the jurisprudence as a source of law”. This practice is not the same with the model applied in the common law system, but still holds some similarities, the RCC being able to invoke its precedent decisions on the same legal class. The practice is also used by persons petitioning the RCC, arguing their cases by invoking previous Court decisions.

On the work and characteristics of the RCC, Radu Carp and Ioan Stanomir offer us a detailed presentation in their work, *The Limits of the Constitution – On Governing, Politics and Citizenship in Romania*. The authors explain how in 2005 this authority enters - through its actions - the nucleus of

²⁶ *Constituția României*, art. 142, par. (1).

²⁷ *Ibid.*, art. 142, par. (2)-(5).

²⁸ *Ibid.*, art. 147, par.(4).

political debates. Its decisions have been sometimes supported and sometimes considered controversial, like at the end of 2005, when through decision no. 600/2005, it rejects a financial compensations law, acting against HM King Mihai I of Romania. Because of the new position it receives in the eyes of the public opinion and on the stage of political development, this institution becomes the regulator of many aspects of Romanian political life, like the statute of the Romanian President or the parameters of law-making processes. The clear confirmation of this aspect comes also at the end of 2005, and is materialized through decision no. 601/2005, regarding Parliamentary Chambers' regulations and their unconstitutionality. This was the case of intervention within a political dispute, which – through the control lever of “supreme interpreter” of the Constitutional text – helped the Court to reinforce its legitimacy as a referee of disputes on the fundamental law application and interpretation.²⁹

First of all this specific court has the role of a special jurisdiction. After 1996, when it solved a constitutional conflict [concerning Ion Iliescu and his right to run for President], this court becomes an arbitrator of Romanian political life [even against its own will]. Through statute and mission, the Romanian Constitutional Court establishes the frame within which the political actors are acting. Consequently, its credibility determines the credibility of democracy itself.

Looking at the other element of comparison, the German Constitutional Court (GCC) is considered by Erhard Blankenburg to enter the German Legal System as a late accomplishment of a XIXth century liberal dream.³⁰ Although such a judicial body was stipulated in the *Paulskirchenverfassung* of 1849, until the end of the Weimar Republic it was not possible to establish it, due to both the opposition of the *Lands* and of the Emperor, who considered matters of political nature should only be solved politically and not judicially.³¹ Nowadays, the unique profile of this authority has been placed under the aegis of the Parliament, being regulated by an Organic Law of 1951³² and a secondary norm (dated 1975) which states the internal procedures and proceedings of the Court, such as situations and means to remove a judge from a specific case.

While building the GCC, the Constituent Assembly of 1949 modeled it after the Austrian Constitutional Court project of 1920, adding some United States Supreme Court characteristics, like the possibility to revise (by relating to

²⁹ Radu Carp, Ioan Stanomir, *Op. cit.*, pp. 221-223.

³⁰ Erhard Blankenburg, “Changes in Political Regimes and Continuity of the Rule of Law in Germany”, in Herbert Jacob, (ed.), *Courts, Law, and Politics in Comparative Perspective*, Yale University Press, New Haven, 1996, p. 308.

³¹ Ludger Helms, *Institutions and Institutional Change in the Federal Republic of Germany*, Palgrave Macmillan, London, 2000, p. 84.

³² Hans J. Lietymann, *Das Bundesverfassungsgericht. Eine sozialwissenschaftliche Studie*, Nomos, Baden-Baden, 1985, pp. 30-59.

the Constitution) judicial decisions of lower hierarchy courts.³³ It is composed of two Senates, a feature unique among the universe of constitutional courts and a design, that has been considered by scholars as a doctrinary separation between judicial and political adjudication.³⁴ A first clear division took place in 1956 due to an unequal volume of cases that were handled by the two chambers, the first Senate being overwhelmed with constitutional complaints. This is why it was regulated for the equal division of labor, both chambers in a plenary session being able to redistribute some of the complaints. Again, in order to increase the Court's effectiveness, in each Senate were organized three substructures (composed of three judges) with the purpose of classifying the petitions. Moreover, thirty years after their establishment, the substructures were further advanced a richer set of prerogatives, in order to be able to establish the admissibility of a petition. This means that before a complaint comes before the entire panel of judges, it has to be considered admissible by the substructure which acts like a small council and rejects different kinds of suits like those already decided upon.³⁵ This system has been strongly criticized quoting art. 101 of the German Constitution, which guarantees the right of a just judgement of every case, the above described procedure in fact blocking the access of individuals to a judicial resolution, through a non-judicial decision. Still, the Court ignores the critics, considering that the same judges would treat those same petitions in a similar manner if it reached the entire panel. On the other side, since the implementation of this design, the Court accelerated its processing capacity, providing solutions on a record number of complaints during the 1990s, a fact that encouraged citizens and state bodies to address it in order to solve disputes.³⁶

Going back to changes suffered by the GCC, all of the amendments brought were meant to increase the effectiveness of the judicial process. The number of judges per Senate was reduced twice, first in 1956 from 12 to 10 and second in 1962, from 10 to 8, the current configuration. Furthermore, the mandate of a judge was limited to 12 years, contradicting the initial construction which was meant to be for life with a mandatory retirement clause at the age of 68. Interesting is also the nature of the panel's composition, namely a political one, the leading represented parties being the CDU/CSU and the SPD, with

³³ Klaus von Beyme, "The Genesis of Constitutional Review in Parliamentary Systems", in Christine Landfried (ed.), *Constitutional Review and Legislation: An International Comparison*, Nomos, Baden-Baden, 1988, p. 34.

³⁴ Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2nd edition, Duke University Press, Londra, 1997, p. 17.

³⁵ Ludger Helms, *Op. cit.*, p. 86.

³⁶ Erhard Blankenburg, "Die Verfassungsbeschwerde – Die Nebenbühne der Politik und Klagemauer von Bürgern", *Kritische Justiz*, 31, 1998, p. 212.

exceptions made by FDP nominations.³⁷ Recently, after many attempts, the Green Party also managed an appointment. Regarding appointments, comparing current nominations with those in the 1950s, when judges were selected from political and economic milieus, one may notice that nowadays there is a preference towards jurists and scholars.³⁸

Among the most significant changes in the Court's practices since its establishment in 1949, it is worth mentioning the introduction of the judges' possibility of issuing signed concurring or dissenting opinions unlike what happens in the French and Italian systems.³⁹ The CDU opposed this provision in the 1951 organic law, because it did not want to risk harming the authority of the Court by publishing the divided positions in the panel.⁴⁰ The peak of this prerogative was reached in 1995 when one in every five decisions had a concurring or dissenting opinion.⁴¹ To sum up, although during its more than 60 years of existence, the GCC went through a lot of changes, it still has its 1949 constitutionally-established nucleus of competences conserved, if not in fact enriched.

In a comparative perspective, the German system, though different from common law, resembles to it in what concern the respect of the authority of the judicial precedent, at least at the level of the Constitutional Court. From this point of view, it is similar to the Romanian system, even though in the latter this principle is not applied in a uniform manner. In the German institutional design, once pronounced a decision will stay in place and serve as example for future similar cases. Officially, the *stare decisis* principle is not mandatory for ordinary courts. In fact, no court lower of the GCC uses it as a decisional system, except the previous resolutions of the Constitutional Court, which will serve as precedents both for it and lower courts. By custom, Germany also implemented the power of precedent on a constitutional level, the "lawyers can be fined for failing to invoke relevant precedents in their pleadings".⁴² The fact that there are resemblances among the common law and German system has its roots in the Post-World War II period, while during the *London discussions* "emerged a series of agreed recommendations which set the pattern upon which

³⁷ Peter Häberle, "Die Verfassungsbeschwerde im System der Bundesdeutschen Verfassungsgerichtsbarkeit", *Jahrbuch des öffentlichen Rechts*, 45, 1997, p. 93; Stefan Ulrich PIEPER, *Verfassungsrichterwahlen*, Duncker & Humblot, Berlin, 1998, pp. 27-28.

³⁸ Christine Landfried, "Constitutional Review and Legislation in the Federal Republic of Germany", in Christine Landfried (ed.), *Constitutional Review and Legislation: An International Comparison*, Nomos, Baden-Baden, 1988, p.149.

³⁹ Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe*, Oxford University Press, Oxford, p. 145.

⁴⁰ Hans J. Lietzmann, *Op. cit.*, pp. 53-55.

⁴¹ Ludger Helms, *Institutions and Institutional Change*, p. 89.

⁴² Alec Stone Sweet, *Op. cit.*, p. 146.

the whole of the Western German political development is based”⁴³. Still, the US constitutional revision model was not fully accepted due to the German’s fear of judicializing the politics and politicizing the judiciary.⁴⁴

Democratic evolutions of politics brought up the concept of “governing with judges”, which explains that (and why) it is a generally accepted hypothesis for constitutional courts decisions to have political implications,⁴⁵ though one cannot assume a general politicization of these authorities. A clear example is how modern political history has been written through constitutional courts decisions,⁴⁶ a fact that determines critics to claim that these bodies tend to endanger the constitutionally guaranteed places of parliaments (or governments for that matter) in democratic states.⁴⁷ The history of these somewhat supreme judicial authorities illustrates how they have taken different cases as open invitations to extensive adjudication, assuming new prerogatives that unprecedentedly extended the range of their expertise, so that nowadays one may witness intense arbitration of political topics. Some courts have their own interpretation of what articles of their constitutions represent, a fact that influences their decisions and creates a gap among adjudication in judicial cases and the one in political cases, which may trigger the interpretation that there is a difference between a judicial and legislative function. In this respect, Christine Landfried argues that it has become more and more obvious how the doctrinary separation of powers starts to become less and less obvious for the realities of European governance despite its allegedly well-established place in our minds.⁴⁸

“In the end, governing with judges also means governing like judges.”⁴⁹

The above mentioned concept sheds light upon the “political question doctrine” cases, of which Dieter Grimm, a former GCC judge, thinks they represent a manifestation of the hindrances politicians meet in their encounters with constitutional norms:

“Politicians who enter delicate situations where constitutional norms hinder their plans or ruin their political agenda must not allow themselves the breach of those norms. Such actions tend to fasten wrong social conducts, behaviors generated by the examples of

⁴³ *Documents on the creation of the German Federal Constitution*, p. 3.

⁴⁴ *Ibid.*, pp. 195-196.

⁴⁵ Michael Piazzolo (ed.), *Das Bundesverfassungsgericht: Ein Gericht im Schnittpunkt von Recht und Politik*, Hase & Koehler, Mainz, 1996, *apud* Ludger Helms, *Institutions and Institutional Change*, p. 90.

⁴⁶ Klaus H. Goetz, “The Federal Constitutional Court”, in Gordon Smith, William Paterson, Stephen Padgett (eds.), *Developments in German Politics*, 2, Macmillan, London, 1996, pp. 102.

⁴⁷ Christine Landfried, “The Judicialisation of Politics in Germany”, *International Political Science Review*, 15, 1994, p. 119.

⁴⁸ *Ibid.*, pp. 99, 127-129.

⁴⁹ Alec Stone Sweet, *Op. cit.*, p. 204.

political elites, elites who despite their incapacity of guaranteeing the respect of constitutional norms, can still create cultural models”⁵⁰.

While there is no excuse for unconstitutional political moves or aggressive attacks against fundamental norms, the actors try to justify their actions behind the rigid character of constitutions, considering these to create blockages among authorities or in relation to ambitious political projects. While analyzing such occurrences, one needs to keep in mind the reason of inflexibility of fundamental norms and start any discussion knowing that the nucleus of constitutions represents the protection against unconstitutional actions, like eroding the above named hindrances through excessive amendments.⁵¹

After decades of modern constitutionalism one may draw several conclusions: constitutional courts are absolutely necessary and have to be (re)legitimized and under no circumstances abolished, the norms regulating their functions have to be redefined for completion of the tasks of guarding the constitution, rights and liberties of the citizens. In the case of Romania, the above mentioned commission observes, for example, that the method of selecting judges for this court was faulty until now and suggest to change it together with the way the relations between the public authorities are articulated. As the model of the Central and East European democracies has shown, constitutional courts need to serve as the highest instance that watches to the observance of the constitutional provisions, the rights and liberties of the people forming the state. A physical argument would be the Hungarian Constitutional Court which has proved from 1990 onwards to be a strong and relevant pillar of democracy, as well as an inspiring model, a structure which has also managed to generally develop in post-communist circumstances as the Romanian one did.

When comparing the Romanian Constitutional Court with the German Court, one may identify both theoretical resemblances and practical differences, with a significant impact on the outcomes of their ruling. In Germany the Constitutional Court acts in political question cases like a ballance-setter of power, taking authority from Parliament and granting it to the Executive (for instance, for UN armed forces deployments) or vice-versa (for instance, on complaints concerning EU Treaties). In their development, these courts need to work as a secondary mechanism of protection for the state's and citizens' interests, particularly, as modern political history and contemporary events have shown, as guardians of rights, liberties and fundamental provisions from other authorities and political actors. The post-communist Romanian Constitutional

⁵⁰ Martina Schlögel, “Das Bundesverfassungsgericht im Politikfeld Innere Sicherheit. Eine Analyse der Rechtsprechung von 1983 bis 2008”, in *Beitraege zur Politikwissenschaft*, 94, Peter Lang, 2010, p. 36; *apud* Dieter Grimm, “Hütet die Grundrechte!” *Die Zeit*, 17, 1997, p. 44.

⁵¹ See art. 79, par. (3) of the German Constitution.

Court's experience, as interpreted by most scholarship on the topic still needs to redefine its structure, organization and legal framework in order to exercise fully its role of guardian of rights and liberties, and guarantor of the constitution. Such changes could be made through modifications of the legislative framework of the Court, but even in this case the RCC would still be required to adjudicate in relation to the ambiguous fundamental law that Romanian currently has.

For such reasons, Romanian scholars writing on this topic frequently support the idea of a revision of the Constitution, but their argument has been often abused by political actors seeking public acceptance and support. The 2003 revision process revealed that a simple revision is not sufficient, especially when working with a systemically compromised structure and that there is a need for a reconstruction of the Romanian Constitution, with observance granted to core democratic principles. This larger discussion is concentrated upon the fact that rules tend to describe the game or system and this determines participants to try and construct the rules by their desires. Consequently, the choice of rules becomes a debate on how people choose their limitations and constraints. At the same time, from a political viewpoint supporting the view that "institutional constraints are based on individual interests"⁵², the government will be essential to any potential revisions process.

A new Constitution has to empower citizens and place key institutions like the Constitutional Court outside the reach of politicians, both by changing the way judges are elected for the Constitutional panel and by ensuring that competences of this authority are not easily amendable by governmental emergency ordinances. As the GCC has pointed out several times in the latent conflict with the European Court of Justice, the *Kompetenz-Kompetenz* is a serious hindrance, where one institution must not be left with the capacity to establish its' own competences, nor must it be allowed for those affected by an authority's decision to strip it of its instruments or keep it under constant pressure. "Control is difficult"⁵³ and any further actions need to keep in mind that while constructing constitutional families, democracy and popular sovereignty must be placed outside the reach of amending power. In short, from this point onwards, one should rather ask: is a legitimate power, which is able to limit almost any legislation, also able to limit itself?

⁵² James Buchanan, "The Domain of Constitutional Economics", p. 4.

⁵³ Robert A. Dahl, *Dilemmas of Pluralist Democracy*, Yale University Press, New Haven, 1982; *apud* Judith E. Gruber, *Controlling Bureaucracies: Dilemmas in Democratic Governance*, University of California Press, 1987, pp. 1-7.